R.

Affirmed. Judge Davis
Judge Swayne
Wintr

Vol. 1 420
Oct. T. 1877.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~180.~~ 223

MATTHEW BAIRD, APPELLANT,

vs.

~~THE UNITED STATES.~~

~~224~~

No. ~~440.~~—CROSS-APPEAL.

~~THE UNITED STATES, APPELLANTS,~~

vs.

MATTHEW BAIRD.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 22, 1870.

Dec. 1871

SUPREME COURT OF THE UNITED STATES.

No. 439.

MATTHEW BAIRD, APPELLANT,

vs.

THE UNITED STATES.

No. 440.—CROSS-APPEAL.

THE UNITED STATES, APPELLANTS,

vs.

MATTHEW BAIRD.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.*

United States Court of Claims.

MATTHEW BAIRD
vs.
THE UNITED STATES.

To the honorable the judges of the Court of Claims:

Your petitioner, Matthew Baird, of the city of Philadelphia, in the State of Pennsylvania, respectfully shows to your honors:

That, in the year 1864, he was engaged in business with Matthew W. Baldwin, as the firm of M. W. Baldwin & Co., in the manufacture of locomotive engines, and they were proprietors of the extensive establishment known as M. W. Baldwin & Co's Locomotive Works, in the city of Philadelphia, which is the largest of its kind in the United States.

That the said Matthew W. Baldwin died on or about the seventh day of September, 1866, leaving your petitioner the surviving partner of the said firm.

That, on the 17th day of March, 1864, your petitioner's firm were under contract with various private parties to furnish eighty-five engines at various times between that date and the 19th of November following, and all the resources of their establishment were not more than equal to the fulfilment of said contracts during that period.

That, in the said month of March, 1864, the Government of the United States having urgent need for engines for the use of the Army in Tennessee, in order to equip the lines of military communication, Colonel Daniel C. McCallum, director and general manager of military railroads of the United States, called upon you' petitioner's said firm

2 to ascertain whether they could furnish some such engines; but, in consequence of the condition of the work in their establishment, as hereinbefore stated, your petitioner's firm could not commence furnishing to the Government any engines prior to the 21st of November following, unless they should postpone the execution of private orders, and should use, to build engines for the Government, the materials and partly-finished work prepared to fill such private orders. And the exigency of the case being such as not to admit of any delay, the said Col. Daniel C. McCallum, being thereto duly authorised by the United States, gave to your petitioner's firm a peremptory order, of which a copy is hereto annexed, marked Exhibit A, whereby he required them to furnish for the United States fifteen engines of the kind therein described, to the exclusion of all private interests and contracts.

That, at the date of the said order, the prices of all materials which enter into the construction of engines had been for a long time steadily rising, and were expected to continue to rise for a long time thereafter. And Colonel McCallum was aware that such was the case from the statements to him made by your petitioner's firm, as well as from the usual sources of information, and knew that if your petitioner's firm should postpone the execution of the said private orders until after the completion of the engines desired by him, the cost of the said engines for private parties would be largely increased by the rise of prices while their construction was delayed.

And in giving the said order, it was not the intention of the said Col. McCallum to secure for the United States any advantage, other than

the delivery of the said engines in advance of all private orders; and therefore as to the price, it was intended that the said firm should receive such compensation as would have been paid by private parties ordering such engines at the same time; that is to say, such price as would be just and fair at the time when such engines could have been manufactured by the said firm, which would have been from the 21st of November to the 31st of December, 1864. But inasmuch as the
3 said firm were to deliver the said fifteen engines for the United States immediately, it was necessary to so arrange the terms that a partial payment could be made on the delivery of the engines; and it was therefore agreed and embodied in the papers signed by the parties as herein set forth; that a certain price should be paid in cash on delivery, and a further allowance should be made thereafter so as fully to compensate the said firm for the said engines, and to indemnify them against all damage resulting from the postponement of private orders.

And the amount to be paid on delivery was fixed as follows, that is to say: the engines desired by Col. McCallum were similar to certain engines built by your petitioner's firm for the Louisville and Frankfort, and Lexington and Frankfort Railroads, by agreement of November 9, 1863; and taking the price of those engines as a basis, and adding thereto the value of certain alterations required by Col. McCallum, it was estimated that the value of the engines of the kind ordered by Col. McCallum, had the same been contracted for and deliverable on the 9th of November, 1863, would have been $18,947 74 at the then ruling prices of labor and materials. And on the same day, to wit, on the 17th day of March, 1864, by letter, addressed to said Col. D. C. McCallum, and accepted by him, a copy of which is hereto annexed, marked Exhibit B, your petitioner's firm represented their willingness to obey his order of that date, and also stated the said amount to be paid in cash, on delivery, for the fifteen engines as aforesaid, which sum was referred to but not stated in money in the said order of Col. McCallum, which said order of Col. McCallum was afterward affirmed by the President of the United States, in an order dated March 22, 1864, of which a copy is hereto annexed, marked Exhibit C.

That your petitioner's firm proceeded to fill the order given by Col. McCallum as aforesaid, and between the date of said order and the 30th of June following, completed and delivered to the United States the said fifteen engines, and received the sum of $18,947 74 and the Government tax, three per cent., making the cash payment agreed upon, $19,316 15 for each engine on delivery, and for all the sum of $292,742 25.

4 And subsequently, a further allowance was made to your petitioner's said firm for the additional cost of the materials and labor used in constructing the fifteen engines so ordered for the Government, over the cost of the same on the 9th day of November, 1863, and computed to the date of delivery, amounting, with interest, to the sum of $97,507 75, as is more particularly shown in a statement hereto annexed, marked Exhibit D.

And your petitioner further shows that the said allowances do not embrace any compensation or indemnification for the postponement of their private orders, although in fact by the postponement of such private orders, in compliance with Col. McCallum's order, your petitioner's firm incurred an increased expense in filling said private orders to the amount of $111,875, owing to the rise of materials and labor during the time when the execution thereof was postponed to build the engines for the United States; and no part of such increased cost was

paid either by the United States or by the parties for whom the engines were constructed.

Your petitioner further shows that had the said engines so built for the United States, been constructed and delivered in their order, after the engines previously ordered by private parties, and at the prices ruling on the days of delivery they would have been worth, and would have cost the United States $33,475 each, or $502,125. Whereas the Government has paid only $390,250, leaving a balance of $111,875, which will be retained by the Government, and the loss thereof thrown upon your petitioner unless the court afford the redress hereby prayed.

And your petitioner further shows that, after receiving the said payments, your petitioner's said firm applied to the department for such further allowance as would fully indemnify them in the premises; and the claim was referred by the Secretary of War to a board of officers, detailed by him, and was by them rejected in a decision, of which a copy is hereto annexed, marked Exhibit E.

And your petitioner further shows that he would not be indemnified by the repayment, at this time, of the money laid out and ex-
5 pended by the said firm in the year 1864, and he claims as part of the indemnity expressly stipulated by the order of Col. McCallum, such further allowance whether calculated by way of interest, or otherwise ascertained, as will make them complete and whole in the premises, which allowance he says should not be less than $30,000.

And your petitioner claims in this suit the sum of $141,875.

And your petitioner further shows that he and the said M. W. Baldwin, in his lifetime, have at all times borne true allegiance to the Government of the United States, and that neither of them has ever aided, abetted, or given encouragement to the rebellion against the said Government.

MATTHEW BAIRD.

CARLISLE & MCPHERSON,
Attorneys for Claimant.

STATE OF PENNSYLVANIA,
County of Philadelphia:

Before the undersigned, a commissioner of the Court of Claims, personally appeared Matthew Baird, and signed the foregoing petition, and made oath, according to law, that no assignment or transfer of the claim in the said petition stated, or of any part thereof, or any interest therein has been made; that he is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in the said petition are true.

Given under my hand this sixteenth day of October, A. D. 1867.

ARTHUR M. BURTON,
Comm'r Court of Claims, Phila., Pa.

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6 EXHIBIT A.

OFFICE OF DIRECTOR AND GENERAL MANAGER
MILITARY RAILROADS U. S.,
New York, March 19 [17?], 1864.

Messrs. M. W. BALDWIN & CO., *Philadelphia.*

GENTLEMEN: In pursuance of the authority in me vested, I do hereby direct you to construct, at the earliest practicable period, fifteen (15)

locomotive engines, of five (5) feet guage, for the use of the United States Government, to the exclusion of all other interests or contracts whatever, it being understood that you will be indemnified for any damage resulting from a compliance with this order. In replacing any engines taken from other parties in filling this order you are authorized to charge the Government any advance in the cost of materials and labor over the cost of these on the 9th day of November, 1863, this being the date of a certain contract made by you with the Louisville and Frankfort and Lexington and Frankfort Railroad Co., upon which the value of the fifteen (15) locomotives above referred to was based.

D. C. McCALLUM,
Col., Director and General Manager M. R. R. U. S.

EXHIBIT B.

PHILADELPHIA, *March* 17, 1864.

Col. D. C. McCALLUM,
Director and General Manager M. R. R. U. S.

SIR: In compliance with your order of this date we will furnish the United States fifteen (15) locomotive engines, with cylinders 16 x 24; four driving wheels, five feet diam.; 153 copper flues, eleven feet long and two inches diameter; two pumps and one No. five injector; tenders of 1,800 gallons' capacity on two tracks, eight wheels, same as Penn. Railroad standard *guage*, five feet; the whole number to have precedence of all other work whatever, and to be finished with all possible dispatch; for which we are to receive on delivery the sum of eighteen thousand nine hundred and forty-seven seventy-two one hundredth dollars *and* for each engine and Government tax.

7 This price is based upon a contract made with the Louisville and Frankfort, and Lexington and Frankfort Railroad on the 9th of November, 1865.

M. W. BALDWIN & CO.

The above is hereby accepted.

D. C. McCALLUM,
Col. Director and General Manager M. R. R. U. S.

EXHIBIT C.

WAR DEPARTMENT,
Washington City, March 22d, 1864.

GENTLEMEN: Colonel Daniel E. McCallum, general manager of Government railways in the Departments of the Cumberland, of the Ohio, and of the Tennessee, has been authorized by this Department to procure locomotives, without delay, for the railways under his charge.

In order to meet the wants of the military departments of the Government you will deliver to his order such engines as he may direct, whether building under orders for other parties or otherwise, the Government being accountable to you for the same.

The urgent necessity of the Government for the immediate supply of our armies operating in Tennessee renders the engines indispensable for

the equipment of the lines of communication, and it is hoped that this necessity will be recognized by you, as a military necessity, paramount to all other considerations.

By order of the President.

EDWIN M. STANTON,
Secretary of War.

Messrs. BALDWIN & Co., *Philadelphia, Pa.*

EXHIBIT D.

WASHINGTON, *January* 23, 1865.

Messrs. M. W. BALDWIN & Co.

GENTLEMEN: I am in receipt of your letter of the 20th. I cannot give you an official reply, as I have nothing to do in regard to the settlement of the claims. As I understand the matter, owing to the very great difference in the bills for damages of the several manufacturers, an average of the whole was made, which average made the engines come to $25,750 each, including the tax.

8	Your fifteen engines at that rate amounted to...	$386,250 00
	But as you had on hand a larger amount of material that could not be used for our machines, there was added as interest.....	4,000 00
	Making	$390,250 00
	Deduct amount paid by me.....	292,742 25
	Leaving a balance due you of.....	$97,507 75

I give you the above from information I have received of the engineers.

Yours, respectfully,

H. L. ROBINSON.

EXHIBIT E.

WAR DEPARTMENT,
ROOMS OF THE CLAIMS COMMISSION,
Washington, D. C., November 3d, 1866.

In the matter of the claim of M. W. Baldwin & Co. for increased compensation and indemnity for fifteen (15) locomotives furnished the Government for military purposes. No. 70.

Decision.

This claim originated under the same circumstances as the claim of Richard Norris & Son, and the same principles were applied to its settlement as in the settlement of the claim of that firm, and, like that claim, it now comes before the commission by reference from the War Department as an appeal from the settlement there made. See decision in case No. 273.

On the 17th of March, 1864, Col. McCallum, director and general manager of military railroads, directed the claimants, M. W. Baldwin & Co., to construct, at the earliest practical period, fifteen (15) locomotive engines, of five (5) feet *guage*, for the use of the United States Government, to the exclusion of all other interests or contracts whatever, it being understood that you will be indemnified for any damage resulting from a compliance with this order. In replacing any engines that may be taken from other parties in filling this order, you are authorized to charge the Government any advance in the cost of materials and
9 labor over the cost of these on the 9th day of November, 1863, that being the date of a contract made by you with the Louisville and Frankfort, and Frankfort and Lexington Railroad Company, upon which the value of the fifteen (15) locomotives above referred to is based. The date of this order is fixed by the reply of Messrs. Baldwin & Co., of March 17th, 1864, in which they state that they "will furnish the United States with fifteen (15) locomotive engines, with cylinders 16 x 24; four driving wheels, 5 feet diameter; 153 copper flues, 11 feet long and 2 inches diameter; 2 pumps and 1 injector, No. 5; tenders of 1,800 gallons' capacity on two trucks, 8 wheels, same as Pennsylvania Railroad standard *guage*, 5 feet; the whole number to have precedence over all other work whatever, and to be finished with all possible dispatch; for which we are to receive, on delivery, the sum of eighteen thousand nine hundred and forty seven dollars and seventy-two cents for each engine and Government tax. This price is based upon a contract made with the Louisville and Frankfort and Lexington and Frankfort Railroad on the 9th day of November, 1863."

The question of compensation to be allowed is the sum fixed by the contract of November 9th, 1863, increased by the increased cost of materials and labor from the date of that contract to the date of the agreement of March 17th, 1864, and Government tax upon the total for each engine. Under that agreement, interest or an allowance in lieu of interest at the usual rates from the date of delivery of each engine, to the date of payment should also be allowed.

The elements that determine the increased cost of labor and materials, as furnished by the different contractors, are so variable and indeterminate that they cannot be use-applied, but the claimants themselves have furnished data in relation to their own case, which can directly and with a reasonable degree of certainty be applied to this settlement, both as to compensation and to indemnity.

In November, 1863, they had contracts with private parties for more than seventy-two (72) engines, the greater part of which were at fixed prices, the remainder to be determined by the increased cost of materials and labor between the dates of contract and dates of delivery. Between the 1st of July and the 31st of December, 1864, 54 engines at fixed prices and 18 at contingent prices were delivered. The average cost of the former was $17,318 89 for each engine, and of the latter $29,169 52. The difference $11,850 63, represents the increased cost of materials and labor between November 15th, 1863, and De-
10 cember 31st, 1864. The variable elements in the ratio thus obtained results from the fluctuations in the market price of materials and labor during the period to which it applies, and from the different value of the engines furnished, but when the average is obtained from so many elements, the mean error for any particular engine or any particular period will be very trifling.

The contract price of November 9th, 1863, which formed the basis of the agreement of March 17th, 1864, was $18,947 72, the increased cost

of materials and labor from the 9th of November, 1863, to the 17th of March, 1864, as determined from the data and in the manner above cited, was $3,600 26. The total of these sums increased by the excise tax, represents the contract price of each engine furnished under the agreement of March 17th, 1864, and as this was payable on delivery, interest from the data of delivery to the date of payment for each engine should be added.

The subjoined table "A," exhibits the application of these rules in detail.

The indemnity to be awarded is measured by the increased cost of materials and labor during the period that the execution of existing contracts was suspended; that is, from the 17th day of March, 1864, to the date of delivery of each engine, by the excise tax upon this increase and by interest upon the total of these sums from the date of the delivery of each engine, to the date of the payment made as indemnity. By the order of Colonel McCallum, the increase in the cost of materials and labor between the 9th of November, 1863, and the 17th of March, 1864, was made a part of the compensation and was due on the delivery of the engines. Interest on this sum, increased by the excise tax, from the date of delivery to the date of the payment as indemnity, should be allowed as indemnity, and it is so regarded by the commission.

The subjoined table, "B," exhibits the application in detail of these rules to the question of indemnity.

These calculations give as compensation.....	$348,513 36
" " " as indemnity.....	39,741 18
Total as compensation and indemnity.....	$388,254 54

The claimants allege that the system of averages adopted in the original settlement was unjust to them, because the materials and labor furnished by them were of a better quality than those furnished by other contractors, and therefore that their engines generally were
11 better than other engines furnished the Government, and specially that their engines were provided with coppered flues, while the engines furnished by other contractors had iron flues. This alleged superiority of their engines is not admitted by the Quartermaster General, and the evidence submitted by the claimants is too indefinite to warrant a conclusion by the commission, even if such conclusion were pertinent to the issue in question. The engines furnished by these claimants were provided as claimed, with copper flues, and a part, at least, of the engines furnished by other contractors with iron flues, but this is not material, as by their contract of March 17th, 1864, Messrs. Baldwin & Co. agreed to furnish copper flues. Moreover the settlement of such claims by the administrative departments and by the accounting officers of the Treasury must be determined ex contractu, that is, in this case, by the agreement of March 17th, 1864, and the guarantee of March 8th, 1864, and the commission has given the most liberal construction to these that their terms and their spirit will warrant, and any further relief must be sought in Congress.

The contractors claim that they were allowed in the previous settlement, the sum of $4,000 as interest on the values of material collected by them. This item is rejected by the commission as unwarranted by any consideration of equity or justice.

The remarks made by the commission upon the parallel claim of Richard Norris & Son, apply with equal force to this, but it is proper to add that while the evidence in these cases affords strong presumptions that some of the manufacturers, who furnished engines under the President's order of March 8th, 1864, have been paid more than they were justly entitled to, there is no proof that Messrs. Baldwin & Co. have been paid less than they should have been paid.

The claim for additional indemnity is rejected.

12 *"A."—Compensation.*

No. of engine.	Date of delivery.	Date of payment.	Contract price.	Add'l cost of labor, material, &c., from Nov. 9, '63, to Mar. 17, '64.	Additional 3 per ct. excise tax.	Interest from date of delivery to date of payment.	Total.
	1864.	1864.					
151	May 3	May 5	$18,947 72	$3,600 26	$676 44	$11 61	$23,236 03
152	do. 9	do. 12	18,947 72	3,600 26	676 44	11 61	23,236 03
153	do. 11	do. 12	18,947 72	3,600 26	676 44	3 87	23,228 29
154	do. 17	do. 21	18,947 72	3,600 26	676 44	15 48	23,239 90
155	do. 25	do. 26	18,947 72	3,600 26	676 44	3 87	23,228 29
156	do. 28	do. 30	18,947 72	3,600 26	676 44	7 74	23,232 16
157	do. 31	do. 31	18,947 72	3,600 26	676 44	7 74	23,224 42
158	June 2	June 3	18,947 72	3,600 26	676 44	3 87	23,228 29
159	do. 9	do. 13	18,947 72	3,600 26	676 44	15 48	23,239 90
160	do. 14	do. 15	18,947 72	3,600 26	676 44	3 87	23,228 29
161	do. 17	do. 18	18,947 72	3,600 26	676 44	3 87	23,228 29
162	do. 21	do. 22	18,947 72	3,600 26	676 44	3 87	23,228 29
163	do. 23	do. 29	18,947 72	3,600 26	676 44	23 22	23,247 64
164	do. 25	do. 29	18,947 72	3,600 26	676 44	15 48	23,229 90
165	do. 30	July 6	18,947 72	3,600 26	676 44	23 22	23,247 64
			$284,215 80	$54,003 90	$10,146 60	$147 06	$348,513 36

13 *"B."—Indemnity.*

No. of engine.	Date of delivery.	Date of payment.	Add'l cost of materials, labor, &c., from Mar. 17, '64, to dates of delivery.	Excise tax, 3 per ct.	Add'l cost of labor, material, &c., from Nov. 9, '63, to Mar. 17, 1864, inc. excise tax.	Total.	Interest from date of delivery to April 9, 1865.	Total of indemnity.
	1864.	1864.						
151	May 3	May 6	$1,351 72	$40 55	$4,276 70	$5,668 97	$317 46	$1,709 73
152	do. 9	do. 12	1,524 28	45 73	4,276 70	5,846 71	321 57	1,891 58
153	do. 11	do. 12	1,581 80	47 45	4,276 70	5,905 95	322 86	1,952 11
154	do. 17	do. 21	1,754 36	52 63	4,276 70	6,083 69	326 49	2,133 48
155	do. 25	do. 26	1,984 44	59 63	4,276 70	6,320 67	330 78	2,374 75
156	do. 28	do. 30	2,070 92	62 12	4,276 70	6,409 54	332 23	2,465 07
157	do. 31	do. 31	2,157 00	64 71	4,276 70	6,498 41	333 59	2,555 30
158	June 2	June 3	2,214 52	66 44	4,276 70	6,557 66	335 53	2,616 49
159	do. 9	do. 13	2,415 84	72 48	4,276 70	6,765 02	338 25	2,856 57
160	do. 14	do. 15	2,569 64	76 79	4,276 70	6,913 13	334 23	2,970 66
161	do. 17	do. 18	2,645 92	79 38	4,276 70	7,002 00	340 76	3,066 06
162	do. 21	do. 22	2,751 06	82 53	4,276 70	7,110 29	341 59	3,174 88
163	do. 23	do. 29	2,818 48	84 55	4,276 70	7,179 73	342 23	3,245 26
164	do. 25	do. 29	2,876 00	86 28	4,276 70	7,238 98	342 65	3,304 93
165	do. 30	July 6	3,020 19	90 61	4,276 70	7,387 50	343 51	3,454 31
			$33,725 97	$1,011 78	$64,150 50	$98,888 25	$5,003 43	$34,793 18

A true copy.

DE WITT CLINTON, *Bvt. Lt. Col., Recorder.*

14 In the United States Court of Claims, December term, A. D. 1867.

MATTHEW BAIRD, SURVIVING PARTNER OF M. W. Baldwin & Co., *vs.* THE UNITED STATES. } No. 2929.

And the said defendants, by their solicitor, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of one hundred & forty-one thousand eight hundred & seventy-five dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

JOHN B. KERR,
Deputy Solicitor for the U. S.

15 In the Court of Claims.

MATTHEW BAIRD *vs.* THE UNITED STATES. } 2929.

And now, to wit, 7th of March, A. D. 1870, the court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Matthew Baird, as surviving partner of the firm of M. W. Baldwin & Company, have, and recover of and from the United States the sum of twenty-three thousand seven hundred & fifty dollars no cents, ($23,750 00.)

By the court:

A true copy of record.

16 In the Court of Claims.

MATTHEW BAIRD *vs.* THE UNITED STATES. } 2929.

And now comes the claimant and prays the court to allow an appeal to the Supreme Court of the United States from the judgment of the court in this cause, rendered on the 7th day of March, 1870.

CARLISLE & McPHERSON,
Att'ys for Claimant.

Filed in clerk's office, May 17, 1870.

Ordered, That the appeal as prayed by claimant in the case of Matthew Baird v. The United States be allowed.

By the court.

MAY 17, 1870.

17 In the Court of Claims.

MATTHEW BAIRD
vs.
THE UNITED STATES. } 2929.

From the judgment rendered in the above-entitled cause on March 7, 1870, in favor of the claimant, the defendants, by their Attorney General, on this 20th day of May, 1870, make application for, and give notice of, an appeal to the Supreme Court of the United States, the amount in controversy therein exceeding three thousand dollars.

THOMAS H. TALBOT,
Ass't Att'y Gen'l.

Filed in clerk's office, May 20, 1870.

Ordered, That the appeal, as prayed by the defendants in the case of Matthew Baird vs. The United States, 2929, be allowed.

By the court.

MAY 23, 1870.

18 In the Court of Claims.

MATHEW BAIRD
vs.
THE UNITED STATES. } 2929.

This cause coming on to be heard the 11th day of April, 1870, before all the judges of the Court of Claims the said court finds as matters of fact—

This claim is for $141,871, which is prosecuted in this court by Mathew Baird as surviving partner of the firm of M. W. Baldwin & Co., locomotive builders in the city of Philadelphia. The claim rests in contract, and the court find the facts to be—

1. The contract is embodied in the following correspondence:

OFFICE OF DIRECTOR & GENERAL MANAGER,
MILITARY RAILROADS, U. S.,
New York, March 19, [17, ?] 1864.

Messrs. M. W. BALDWIN & Co., *Philadelphia.*

GENTLEMEN: In pursuance of the authority in me vested, I do hereby direct you to construct at the earliest practicable period, fifteen
19 (15) locomotive engines of five (5) feet guage for the use of the United States Government; to the exclusion of all other interests or contracts whatever, it being understood that you will be indemnified for any damage resulting from a compliance with this order. In replacing any engines taken from other parties in filling this order, you are authorized to charge the Government any advance in the cost of materials and labor, over the cost of these on the 9th day of November, 1863, this being the date of a certain contract made by you with the Louisville and Frankfort, and Lexington and Frankfort Railroad Co.,

upon which the value of the fifteen (15) locomotives above referred to was based.

D. C. McCALLUM,
Col., Director & General Manager M. R. R. U. S.

PHILADELPHIA, *March 17th*, 1864.

Col. D. C. McCALLUM,
Director & General Manager M. R. R. U. S.

20 SIR: In compliance with your order of this date we will furnish the United States fifteen (15) locomotive engines, with cylinders 16 × 24; four driving wheels, five feet diam.; 153 copper flues, eleven feet long, and two inches diameter; two pumps, and one No. five injector; tenders, of 1,800 gallons' capacity, on two tracks; eight wheels, same as Penn. Railroad standard guage, five feet. The whole number to have precedence of all other work whatever, and to be finished with all possible dispatch. For which we are to receive, on delivery, the sum of eighteen thousand nine hundred and forty seven seventy-two one hundredth dollars, and for each engine and Government tax. This price is based upon a contract made with the Louisville and Frankfort and Lexington and Frankfort Railroad, on the 9th of November, 1865.

W. M. BALDWIN & CO.

The above is hereby accepted.

D. C. McCALLUM,
Col., Director & General Manager M. R. R. U. S.

21 2. On the 22nd of the same month, Secretary Stanton wrote Baldwin & Co., confirming the authority of Col. McCallum to contract, and stating that the engines were required for immediate use, in order to meet the wants of the military department of the Government then operating in Tennessee.

3. At the time this demand was made, and the contract closed, the house of Baldwin & Co. was under contracts with twenty-six railroad companies to build and deliver about 98 locomotive engines; of this number 18 were finished for private parties, while the Government work was in progress. And of the remaining 80 engines 32 were at fixed prices, and 48 at contingent prices, corresponding to the cost of labor and materials at the date of delivery. The Government work was begun on the 17th of March, 1864, and all private orders postponed, except on the 18 engines finished during its progress. The work on
22 the 80 engines previously ordered by private parties is shown to have been delayed about two months; and the first engine on the Government order was delivered on the 3rd of May, and the last on the 30th of June, 1864.

4. At the date of the Government contract, the firm of Baldwin & Co. had on hands about $400,000 worth of material, which, as far as practicable, was employed in building the Government engines. But during the time the work was in progress, the prices of material and labor were constantly rising. The rise from and after the 9th of November, 1863, was steady and rapid until July, 1864; after that time, and up to the 1st of December, 1864, prices of all kinds of materials remained about the same as they were in the month of July, 1864. Wages rose continually up to the month of December, 1864, from the 9th of November, 1863.

5. The average rise of material from the 9th of November, 1863,

23 to the 1st of May, 1864, was 54 per cent.; from the same date to the 1st of June, 1864, it was 58 per cent.; the same to the 1st of July, 1864, the rise was 86¼ per cent.

Labor rose from the 9th of November, 1863, to the 1st of May, 1864, 23 per cent., and from the same date to the 1st of June, 1864, wages rose 26 per cent.; and from the same date to the 1st of July, 1864, to the 1st of December, wages rose over and above the July prices 25 per cent.

6. The cost of a locomotive engine is made up of 3-5 material, and 2-5 labor.

7. We further find, if the construction of the Government engines had been delayed until the execution of prior orders, the 15 engines ordered for the Government on the 17th of March, 1864, would have been delivered, according to the regular course of business in the manu-
24 factory, from the 21st of November, 1864, to the 30th of December following, whereas the work was begun on the 17th of March, and the whole 15 engines actually delivered between the 3rd of May and the 30th of June, 1864.

8. We also find as the engines were completed, they were charged up to the United States in sections of five, at the increased average price of labor and material employed in their construction at the date of their delivery, viz:

For the first five, each engine	$26,034 19
" " second, " "	26,716 31
" " third, " "	29,747 96

The whole sum, at the above prices charged on the firm books, amounts to $412,492 30.

9. Most of the materials out of which the Government engines were built, had been purchased previous to the Government contract, on orders for private parties; but it appears in making up the average prices on the Government engines, in sections of five each, the
25 calculations were based on the increase of the price of labor, and what it would actually cost to replace the materials used.

10. Bills thus made out as the work progressed, in sections, were presented for payment, and the contract price, $18,947 72, plus 3 per cent. Government tax, were promptly paid, as the engines were delivered, leaving the question of damages for future consideration and adjustment, when the whole should be delivered. The sum paid, including the excise tax due on the contract price, was $292,742 25, which was subsequently advanced, by the Department, on account of the increase of the price of labor and material, interest, &c., $97,507 76, making the whole sum allowed and paid by the Government $390,250 00.

11. After the receipt of this sum, the claimants, on the ground of indemnity, presented their application to the Department for
26 further allowance and indemnity; and this application was referred by the Secretary of War to a board of officers detailed by him to settle and adjust such claims, who, after full consideration, rejected it.

12. It also appears, as before stated, that of the 80 engines at private contracts, 32 were at fixed prices, and 48 at contingent prices; two of the latter appear not to be treated as furnishing any ground of indemnity, for some reason not shown in the record, leaving 46 at contingent rates, and on which indemnity is claimed; and as to these no specific losses on settlements with private parties are proven, other than the additional cost of labor and material, shown in the general rise of both, which rise was charged on each engine only up to within sixty days of the time of delivery.

13. We further find that this abatement on engines built for
27 private parties, at contingent rates, on an average was about $1,250 on each engine; and on settlement with the Galena and Chicago Railroad Company, an actual and specific loss was sustained by the company of $5,000 in consequence of the delay caused by the execution of the Government contract.

14. That the claimant and his deceased partner always bore true allegiance to the United States, and never gave aid or comfort to the rebellion.

15. The court further find, at the special request of the U. S. Assistant Attorney General, that the house of Baldwin & Co. negotiated a contract with the Pennsylvania Railroad Company on the 16th of July, immediately after the Government engines were delivered, for 12 freight engines of class 25—D., and in December for 13 of the same class, on the list 143 to 148, inclusive, and 163 to 182, inclusive. These
28 were about the same weight as the Government engines, freight finish, and costing about as much to build as the Government engines; the agreed price was $30,000 and tax, with the privilege of charging an addition of 10 per cent. as the price of labor and material advanced. Prices went up, but they fell before the engines were finished, and the company did not charge the 10 per cent.

On these facts the court found as conclusions of law:

1. That the claim set up in the argument for $38,617 06, as a balance due on the engines, could not be recovered in this action, because the same was not set forth in the claimant's petition as a ground of complaint, or foundation of a judgment.

2. That the indemnity arising out of the contract was the only claim the court could consider under the petition, and that that indem-
29 nity, under the facts of this case, cannot be measured by any other than an approximate rule of damages, which they fixed as nearly as possible, approximating the losses at $1,250 on each engine, which was really and in fact pushed out of its place into a period of higher prices than it would have been built in under its contract, by the interposition of the Government contract. And those engines thus actually affected, the court held to be only 15 instead of the whole 80 claimed by the plaintiff.

The court also ruled, as matter of law, that the claimant was entitled to recover any specific damage or loss actually shown to have been sustained on settlement with private parties who had entered into contract with the claimant for engines at contingent rates prior to the Government contract, and on that ground they gave $5,000 as part of
30 the judgment, lost in settlement with the Galena and Chicago R. Co., and gave judgment for $23,750 in favor of the claimant.

By the court.

31 In the Court of Claims.

MATTHEW BAIRD
vs.
THE UNITED STATES. } No. 2929.

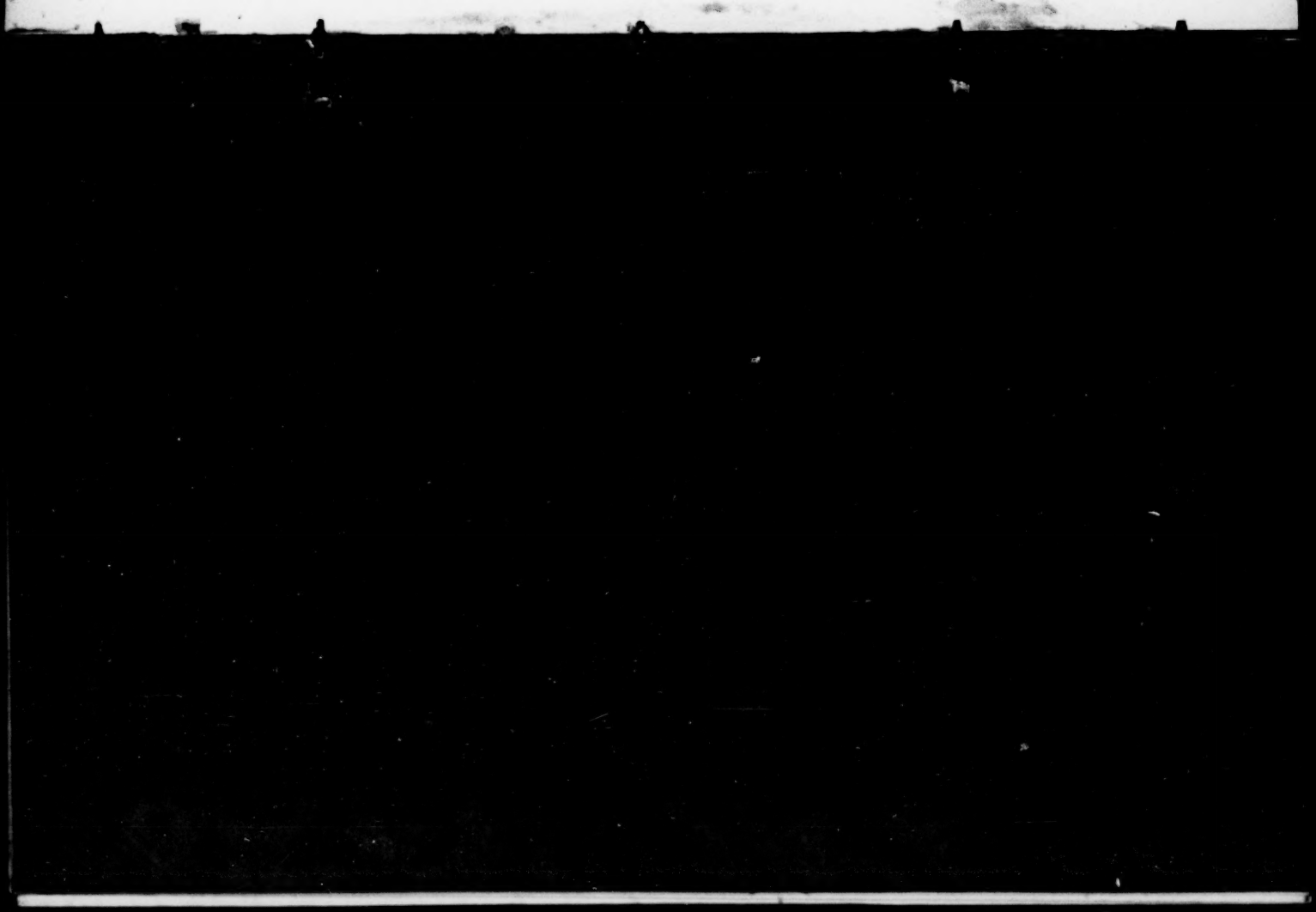
I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the counsel for claimant for the allowance of an appeal, as filed in the clerk's office, May 17, 1870, and of the application

of counsel for defendants for cross-appeal, filed May 20, 1870, and of the orders of the court of May 17, 1870, & of May 23, 1870, allowing the same; of the findings of fact, and the conclusions of law on said facts, on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this twentieth day of December, 1870.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 439. Matthew Baird, appellant, vs. The United States. And No. 440. The United States, appellants, (cross-appeal,) vs. Matthew Baird. Court of Claims. Filed 22d December, 1870.



Supreme Court of the United States.

DECEMBER TERM, 1871.

MATTHEW BAIRD
vs.
THE UNITED STATES. } No. 223.

THE UNITED STATES
vs.
MATTHEW BAIRD. } No. 224.

These are cases of appeal and cross-appeal from the Court of Claims.

Baird was claimant in the court below, and seeks to sustain the judgment in No. 224, so far as it supports his right to recover, and to reverse the judgment in No. 223, so far as it awards him the sum of $23,750, instead of the sum of $100,000.

The Case.

The case made in the findings of the court is this:

In March, 1864, the claimant's firm was ordered by the United States to build fifteen engines for the military service, to the exclusion of all other interests or contracts whatsoever, the United States undertaking to indemnify them for any damage resulting from a compliance with this order. The order was given under an urgent military necessity.

When this order was received, the claimant's firm was

under contract to build 98 engines for private parties. Of these engines eighteen were built while the Government work was going on, but the work on the remaining eighty was suspended, and their completion delayed for sixty days. They were finished in December, 1864.*

During all this time prices of material and labor advanced.

Of the 80 engines, 32 had been contracted for at fixed prices, and 48 at contingent prices, corresponding to the cost of labor and materials at the date of delivery, (3d finding.)

In settling with the purchasers of the 48 engines, the cost, instead of being calculated on the rise of prices, up to date of delivery, was calculated only up to sixty days before delivery, (12th finding,) that is to say, up to the date at which the engines would have been deliverd but for the interposition of the Government. This abatement on an average was $1250 per each engine, (13th finding); *i. e.*, the loss on each engine which, by the interposition of the Government, was really and in fact pushed out of its place into a period of higher prices, was $1250.

Upon these facts the court held "as conclusion of law," that those engines thus actually affected, were only 15 instead of 80, and allowed the increased price on the 15 only.

Assignment of Error.

The claimant assigns as error, that the court held that by the true construction of the contract no indemnity was to be allowed for the increased cost of any of the 80 engines, except the 15 engines whose places were taken by the 15 constructed for the Government.

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*This appears in the seventh finding where it is said that the government engines, if delivered in their time, would have been completed December 30, 1864. Of course these engines whose places they took must have been delivered about that time.

Explanatory.

In every establishment where costly machines are manufactured, requiring long periods of time for completion, single machines are commenced at short intervals and, one after the other, go through the various processes of manuture. In the present case a simple calculation of the elements contained in the findings of the court, shows that a new engine was begun about every fourth day, and every fourth day an engine was turned out completed, but each engine from commencement to completion required sixty days, so that 15 engines were in hand or on the stocks at one time. And as a new Government engine was begun every fourth day, 15 times in succession, no private engine could be begun, and consequently none could be finished or even worked upon for sixty days, and so the court finds.

Now the Court of Claims considered as matter of law, that the claimant should be indemnified for the increased price of the fifteen private engines, whose places were taken by the fifteen Government engines, without giving due consideration to the fact that those fifteen private engines so displaced, delayed fifteen others behind them, and these last fifteen delayed fifteen others, and so on, through the whole number engaged. So that every individual engine was begun and completed sixty days later than it otherwise would have been; and as prices constantly (though not uniformly) advanced, every engine of the whole eighty cost more than it otherwise would have cost.

The judgment of the court can be sustained only upon the idea that only the increased price of the fifteen private engines, whose places the fifteen Government engines took, was the immediate damage, and that the increased price of the others was indirect or remote damages.

First Illustration.

For convenience of calculation, let us suppose the private engines were seventy-five, or five lots of fifteen each. Each lot would occupy sixty days, and the rise in price would be $1,250 for each engine in each period.

For engines of the first lot let us take the price the Government has paid.

Say $390,000 for the 15 engines (9th finding.).....	$26,000
For the second add $1,250.....	27,250
For the third "	28,500
For the fourth "	29,750
For the fifth "	31,000
Then the Government comes in and orders a sixth lot, which would cost.....	32,250

Now, all the Government could reasonably ask was, that its lot should be made in the time of the first lot, without any advantage as to price. This the claimants and their customers were willing to concede. The private customers asked no damages for having their engines delayed sixty days; all they asked was that they should not suffer from the increase that was constantly going on in labor and materials while their work was standing still.

And on this basis, the engine builders settled with their private customers, throwing off $1,250 from each engine as due to the increase which took place during sixty days of the manufacture, and charging that increase to the Government which caused the delay.

But the Government was not satisfied with this. It insisted, not only on *having* its engines first, but on paying only the same price as if it was *entitled* to have its engines first, thus escaping the cost of the rise that took place between the date of the order and the time when the engines would have been delivered in their order.

Second Illustration.

The fair price is, as above—

For the 1st lot, 15 engines at $26,000	$390,000
For the 2d lot, 15 engines at $27,250	408,750
For the 3d lot, 15 engines at $28,500	427,500
For the 4th lot, 15 engines at $29,750	446,250
For the 5th lot, 15 engines at $31,000	465,000
For the 6th lot, 15 engines at $32,250	483,750
	$2,621,250

The price realized under the court's decision is—

Government pays for 15 engines, at $26,000	$390,000	
And $1,250 each on 15 engines	18,750	
		$408,750
Which is really the proper price of the 1st lot.		
The private purchaser of the 2d lot pays only the increased price up to within sixty days of the delivery; that is, he pays the price of the 1st lot		390,000
The private purchaser of the 3d lot, on the same principle, pays only the price of the 2d lot		408,750
The 4th lot brings the price of the 3d		427,500
The 5th lot brings the price of the 4th		446,250
The 6th lot brings the price of the 5th		465,000
And the whole realizes		$2,546,250

To tabulate this—

	Fair prices.	Prices realized.
First lot	$390,000	$408,750
Second lot	408,750	390,000
Third lot	427,500	408,750

Fourth lot	446,250	427,500
Fifth lot	465,000	446,250
Sixth lot	483,000	465,000
	$2,621,250	$2,546,250
Loss		$75,000

Being $18,750 each on 3d, 4th, 5th, and 6th lots.

From this illustration it is evident that the Government changes places with the first private purchaser, while the second, third, fourth, and fifth private purchasers each throw off, as they have a right to do, the $18,750 caused by the delay of sixty days, and this loss is made to fall on the manufacturer.

Third Illustration.

The Government certainly ought not to expect to get its engines as low as any of these private parties, whose orders were long prior in date. In other words, Government ought to take the sixth place, and the order of price and payment would be—

First lot	$390,000	
Indemnity	93,750	
		$483,750
Second lot		390,000
Third lot		408,750
Fourth lot		427,500
Fifth lot		446,250
Sixth lot		465,000
Amount of fair price, as above		$2,621,250

Summary.

The findings show, that of the 80 engines there were 32 engines engaged at fixed prices; as these cost actually

$1,250 more to build than they would have cost if built 60 days earlier; the direct loss on them was 32 times 1250 making $40,000.

The findings show, that there 48 engines contracted for at prices ruling at date of delivery, and that these were settled for at prices ruling 60 days before date of delivery, and the abatement was $1,250 each, but for two of these engines no indemnity is asked*, and on two others there was special loss, leaving 44 engines at $1,250..... $55,000

Special loss on certain engines as found by the court..... 5,000

Total..... $100,000

Conclusion.

For the claimant it is submitted that the cause should be remanded to the Court of Claims, with directions to enter a judgment in favor of the claimant for $100,000.

J. M. CARLISLE,
J. D. McPHERSON,
for Appellants.

*These, it is understood, were relinquished by those who ordered them and were sold without any loss.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

MATTHEW BAIRD, *Appellant*,
vs.
THE UNITED STATES. } No. 223.

THE UNITED STATES, *Appellant*,
vs.
MATTHEW BAIRD. } No. 224.

Appeal and cross appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

MATTHEW BAIRD, *Appellant*,
vs.
THE UNITED STATES. } No. 223.

THE UNITED STATES, *Appellant*,
vs.
MATTHEW BAIRD. } No. 224.

Appeal and cross appeal from the Court of Claims.

ASSIGNMENT OF ERROR BY THE UNITED STATES.

The Attorney General, on behalf of the United States, submits that the Court of Claims erred in granting judgment for the claimant, because he had received a sum of money from the United States in full settlement of the claim which was the subject of his suit.

GEO. H. WILLIAMS,
Attorney General.
WILLIAM McMICHAEL,
Assistant Attorney General.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

MATTHEW BAIRD, *Appellant*,
vs.
THE UNITED STATES. } No. 223.

THE UNITED STATES, *Appellant*,
vs.
MATTHEW BAIRD. } No. 224.

Appeal and cross appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The following statement of facts is contained in the findings of the Court of Claims in the suit of Matthew Baird *vs.* The United States:

This claim is for $141,871, which is prosecuted in this court by Matthew Baird as surviving partner of the firm of M. W. Baldwin & Co., locomotive builders in the city of Philadelphia. The claim rests in contract, and the court find the facts to be—

1. The contract is embodied in the following correspondence:

OFFICE OF DIRECTOR & GENERAL MANAGER,
MILITARY RAILROADS, U. S.,
New York, March 19, [17, ?] 1864.

Messrs. M. W. BALDWIN & Co., *Philadelphia.*

GENTLEMEN: In pursuance of the authority in me vested, I do hereby direct you to construct at the earliest practicable period, fifteen (15) locomotive engines of five (5) feet guage for the use of the United States Government; to the exclusion of all other interests or contracts whatever, it being understood that you will be indemnified for any damage resulting from a compliance with this order. In replacing any engines taken from other parties in filling this order, you are authorized to charge the Government any advance in the cost of materials and labor, over the cost of these on the 9th day of November, 1863, this being the date of a certain contract made by you with the Louisville and Frankfort, and Lexington and Frankfort Railroad Co., upon which the value of the fifteen (15) locomotives above referred to was based.

D. C. McCALLUM,
Col., Director & General Manager M. R. R. U. S.

PHILADELPHIA, *March 17th*, 1864.

Col. D. C. McCALLUM,
Director & General Manager M. R. R. U. S.

SIR: In compliance with your order of this date we will furnish the United States fifteen (15) locomotive engines, with cylinders 16 × 24; four driving wheels, five feet diameter; 153 copper flues, eleven feet long, and two inches diameter; two pumps, and one No. five

injector; tenders, of 1,800 gallons' capacity, on two tracks; eight wheels, same as Pennsylvania railroad standard guage, five feet. The whole number to have precedence of all other work whatever, and to be finished with all possible dispatch. For which we are to receive, on delivery, the sum of eighteen thousand nine hundred and forty seven seventy-two one hundredth dollars, and for each engine and Government tax. This price is based upon a contract made with the Louisville and Frankfort and Lexington and Frankfort Railroad, on the 9th of November, 1865.

W. M. BALDWIN & CO.

The above is hereby accepted.

D. C. McCALLUM,

Col., Director & General Manager M. R. R. U. S.

2. On the 22nd of the same month, Secretary Stanton wrote Baldwin & Co., confirming the authority of Colonel McCallum to contract, and stating that the engines were required for immediate use, in order to meet the wants of the military department of the Government then operating in Tennessee.

3. At the time this demand was made, and the contract closed, the house of Baldwin & Co. was under contracts with twenty-six railroad companies to build and deliver about 98 locomotive engines; of this number 18 were finished for private parties while the Government work was in progress. And of the remaining 80 engines 32 were at fixed prices, and 48 at contingent prices, corresponding to the cost of labor and materials at the date of delivery. The

Government work was begun on the 17th of March, 1864, and all private orders postponed, except on the 18 engines finished during its progress. The work on the 80 engines previously ordered by private parties is shown to have been delayed about two months; and the first engine on the Government order was delivered on the 3rd of May, and the last on the 30th of June, 1864.

4. At the date of the Government contract, the firm of Baldwin & Co. had on hands about $400,000 worth of material, which, as far as practicable, was employed in building the Government engines. But during the time the work was in progress, the prices of material and labor were constantly rising. The rise from and after the 9th of November, 1863, was steady and rapid until July, 1864; after that time, and up to the 1st of December, 1864, prices of all kinds of materials remained about the same as they were in the month of July, 1864. Wages rose continually up to the month of December, 1864, from the 9th of November, 1863.

The average rise of material from the 9th of November, 1863, to the 1st of May, 1864, was 54 per cent.; from the same date to the 1st of June, 1864, it was 58 per cent.; the same to the 1st of July, 1864, the rise was 86¼ per cent.

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6. The cost of a locomotive engine is made up of 3-5 material, and 2-5 labor.

7. We further find, if the construction of the Government engines had been delayed until the execution of prior orders, the 15 engines ordered for the Government on the 17th of March, 1864, would have been delivered, according to the regular course of business in the manufactory, from the 21st of November, 1864, to the 30th of December following, whereas the work was begun on the 17th of March, and the whole 15 engines actually delivered between the 3d of May and the 30th of June, 1864.

8. We also find as the engines were completed, they were charged up to the United States in sections of five, at the increased average price of labor and material employed in their construction at the date of their delivery, viz:

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" " second, " "	26,716	31
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10. Bills thus made out as the work progressed, in

sections, were presented for payment, and the contract price, $18,947 72, plus 3 per cent. Government tax, were promptly paid as the engines were delivered, leaving the question of damages for future consideration and adjustment when the whole should be delivered. The sum paid, including the excise tax due on the contract price, was $292,742 25, which was subsequently advanced by the Department, on account of the increase of the price of labor and material, interest, &c., $97,507 76, making the whole sum allowed and paid by the Government $390,250.

11. After the receipt of this sum the claimants, on the ground of indemnity, presented their application to the Department for further allowance and indemnity; and this application was referred by the Secretary of War to a board of officers detailed by him to settle and adjust such claims, who, after full consideration, rejected it.

12. It also appears, as before stated, that of the 80 engines at private contracts, 32 were at fixed prices, and 48 at contingent prices; two of the latter appear not to be treated as furnishing any ground of indemnity, for some reason not shown in the record, leaving 46 at contingent rates, and on which indemnity is claimed; and as to these no specific losses on settlements with private parties are proven, other than the additional cost of labor and material, shown in the general rise of both, which rise was charged on each engine only up to within sixty days of the time of delivery.

13. We further find that this abatement on engines built for private parties, at contingent rates, on an

average was about $1,250 on each engine; and on settlement with the Galena and Chicago Railroad Company, an actual and specific loss was sustained by the company of $5,000 in consequence of the delay caused by the execution of the Government contract.

14. That the claimant and his deceased partner always bore true allegiance to the United States, and never gave aid or comfort to the rebellion.

15. The court further find, at the special request of the United States Assistant Attorney General, that the house of Baldwin & Co. negotiated a contract with the Pennsylvania Railroad Company on the 16th of July, immediately after the Government engines were delivered, for 12 freight engines of class 25—D., and in December for 13 of the same class, on the list 143 to 148, inclusive, and 163 to 182, inclusive. These were about the same weight as the Government engines, freight finish, and costing about as much to build as the Government engines; the agreed price was $30,000 and tax, with the privilege of charging an addition of 10 per cent. as the price of labor and material advanced. Prices went up, but they fell before the engines were finished, and the company did not charge the 10 per cent.

On these facts the court found as conclusions of law:

1. That the claim set up in the argument for $38,617 06, as a balance due on the engines, could not be recovered in this action, because the same was not set forth in the claimant's petition as a ground of complaint, or foundation of a judgment.

2. That the indemnity arising out of the contract

was the only claim the court could consider under the petition, and that that indemnity, under the facts of this case, cannot be measured by any other than an approximate rule of damages, which they fixed as nearly as possible, approximating the losses at $1,250 on each engine, which was really and in fact pushed out of its place into a period of higher prices than it would have been built in under its contract, by the interposition of the Government contract. And those engines thus actually affected, the court held to be only 15 instead of the whole 80 claimed by the plaintiff.

The court also ruled, as matter of law, that the claimant was entitled to recover any specific damage or loss actually shown to have been sustained on settlement with private parties who had entered into contract with the claimant for engines at contingent rates prior to the Government contract, and on that ground they gave $5,000 as part of the judgment lost in settlement with the Galena and Chicago Railroad Company, and gave judgment for $23,750 in favor of the claimant.

ARGUMENT.

I.

The petition of the claimant only presents a claim for indemnity based upon the language of the letter of D. C. McCallum, of March 17, 1864, no claim being made for an additional sum for the cost of the engines. Judgment cannot be rendered for a claim not set forth in the petition. The Court of Claims may not be confined strictly to the rules of pleading, but the petition,

being the expression of the cause of action, cannot be supplemented in argument by a distinct and additional subject of suit. In the course of the opinion in this case that court said—

"In the case of *Brown* vs. *The United States* (1 C. Cls., R., 337.) this court held that there could be no recovery on grounds presented in argument, but not set forth in the petition as a ground of complaint, as the foundation of a judgment. The rule is strictly sound, and when applied to this case cuts off the $38,617 06 claimed in the argument as a balance due on the engines. It is nowhere alleged in the petition that this sum, or any other, is due, under the contract, on the price of the engines. On the contrary, it is plainly deducible from the whole body of the petition that the prices and allowances due on this ground have been paid and satisfied. The complaint set forth in the petition is rested on the grounds of indemnity, and we can consider no other." (*Baird* vs. *U. S.*, 5 *C. Cls.*, *R.*, 358.)

Any additional cost of the engines is barred not only because not recited in the petition, but also because the claimant received a sum from the Government in settlement for such additional cost. The petition admits, and the Court of Claims has found, that $18,947 72, plus 3 per cent. Government tax, was paid for each engine as delivered, and subsequently an additional sum of $97,507 76 allowed, which was intended to cover all indebtedness of the Government for increased cost of labor and material. In all, $390,250.00 was paid.

II.

This total payment was intended further to cover the entire claim of the petitioner. Each engine having been paid for as above stated upon delivery, at the rate

of $18,947 72, "the question of damages" was left "for future consideration and adjustment when the whole should be delivered." (10th finding C. Cls., Record, page 12.) This "question of damages" included the whole subject of additional compensation, and, having been considered by the War Department, the extra allowance of $97,507 76 was made, which included $4,000 as interest for material on hand. Annexed to the petition is a letter marked Exhibit D (Record, page 5) which shows that the claimant received this amount after notice. It appears from this letter that a number of similar claims for damages were pending at the time this one was under consideration, and that an average of the whole was made, the claimant, for reasons specified in this letter, receiving beyond the average the further sum of $4,000, referred to. The claimant received this $97,507 76 voluntarily, and was concluded by his acceptance of it. He has annexed to his petition, as Exhibit E, a copy of the report of a commission which examined this whole subject, from which report it will be seen that the settlement with him included both compensation and indemnity. This commission reported that "there is no proof that Messrs. Baldwin & Co. have been paid less than they should have been paid. The claim for additional indemnity is rejected." (Record page 8.)

III.

The Court of Claims, however, decided to reconsider this final settlement, and gave judgment for the claimant for $23,750. If this court should agree with

them that the petitioner had a cause of action against the Government, we submit that it should not increase the amount of the judgment. A reference to the opinion of the Court below will show that, in the view expressed by the court, "no specific damages are proved," except one loss of $5,000, but that the Court of Claims approximated the damages at the sum stated in the judgment. The amount of damage is found, therefore, as an ultimate fact, which is not the proper subject of review here.

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